2013 WL 4833750 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Alberto GARCIA and Audrey Dupee, Husband and Wife, Plaintiffs,
v.
VHS ACQUISITION CORPORATION dba/aka Maryvale Hospital, et al., Defendants.

No. CV2010-070091.
July 2, 2013.

Plaintiffs' Post Trial Motion for Reconsideration and Judgment on APSA Claim

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Honorable Micheal Gordon.

INTRODUCTION

Pursuant to Rules 7.1(e), 50 and 59(a) Plaintiffs move the Court for reconsideration and for a post-trial judicial determination that Plaintiffs are entitled to remedies provided in A.R.S. 46-455 and include same in the Judgment. Alternatively, Plaintiffs ask for a judicial determination that Plaintiffs have met the predicate proof that Plaintiffs would be entitled to remedies under the Adult Protective Services Act (A.R.S. 46-455, "APSA") in the event appellate rulings hold that APSA applies to acute care settings. The grounds for this relief are that the evidence demonstrated at trial, and to which the jury agreed that:

• Plaintiff sustained pressure ulcer injuries while a patient at Maryvale Hospital under conditions in which he was under sedation and dependent upon his healthcare providers for skin protection;

• Pressure ulcers arise from excessive or prolonged pressure/shear to areas of bony prominence in patients at risk of skin breakdown such as Mr. Garcia;

• The mechanism of developing pressure ulcers results from the withholding of necessary nursing services needed to provide skin protection by frequent turning, repositioning and managing bed surfaces so as to reduce the incidents of skin breakdown.

Therefore, there can be no other conclusion than that the evidence and the jury finding support a claim of neglect of a vulnerable adult giving rise to remedies under the APSA law.

In view of the evidence presented at trial and jury verdict, wherein the jury found that Plaintiff sustained pressure ulcer injuries while in a condition vulnerable to skin breakdown, the only question is whether the APSA applies in a hospital setting. The Court has ruled that APSA does not apply to an acute care setting. Plaintiffs submit that the Court erred in making such a ruling and ask the Court to reverse its ruling and allow the remedies provided by APSA. Alternatively, Plaintiffs ask the Court to at least make judicial findings that Plaintiff meets the definitions of A.R.S. 46-451(9) and (6) as a vulnerable neglected adult, so as to avoid retrial in the event the Appellate Courts rule that APSA claims do apply to hospital care.

ARGUMENT

A. THERE ARE FIVE EXCEPTIONS TO APSA'S IMPOSITION OF LIABILITY AGAINST "ANY PERSON OR ENTERPRISE." ONLY FIVE. AND NONE OF THOSE FIVE EXCEPTIONS APPLIES TO A CORPORATE HOSPITAL

Under A.R.S. § 46-455(B), a vulnerable adult injured or endangered by neglect or **abuse** may file a superior-court lawsuit against "any person or enterprise" that has neglected or **abused** the vulnerable adult-as long as that person or enterprise:
(1) was employed to provide care to the vulnerable adult, or

(2) assumed a legal duty to provide care to the vulnerable adult, or

(3) was appointed by a court to provide care to the vulnerable adult.

The first question is this: Is a corporate hospital-like the defendant hospital in this case-a "person or enterprise?" APSA never defines "person." But A.R.S. § 1-215(29) explains that, as used in an Arizona statute, "person" is a term that "includes a corporation, company, partnership, firm, association, or society, as well as a natural person." That definition, like all definitions in Chapter 2 of the Arizona Revised Statutes, applies when construing A.R.S. § 46-455(B), unless the resulting "construction would be inconsistent with the 2 manifest intent of the legislature." [1] Nothing indicates that construing "person" in A.R.S. § 46-455(B) in accordance with A.R.S. § 1-215(29)'s definition would be inconsistent with the manifest intent of the Legislature in creating the APSA statutory scheme. Therefore, under APSA, a corporate hospital is a "person.

The last part of the first question is whether a corporate hospital is an "enterprise." For the term "enterprise," neither APSA nor any other Arizona statute supplies a definition. But "enterprise" is not a strange word. It simply means "an organization," especially one "for business purposes." [2] This Court must apply that everyday definition to this everyday word. [3] And doing that, under the terms of A.R.S. § 46-455(B), the corporate hospital defendant in this case is an "enterprise."

The second question is whether a corporate hospital, being a potentially liable "person or enterprise," can be liable for **abuse** or neglect that it has committed against one of its vulnerable adult patients, such as the **elderly** vulnerable patient in this case. The answer is "yes"-for two reasons. First, a corporate hospital is surely employed to provide care to its vulnerable adult patients. (If a hospital is not providing "care," what is it good for?) Second, a corporate hospital has assuredly assumed a legal duty to provide care to its vulnerable adult patients.

The third question is the final one: Are there any exceptions to A.R.S. § 46-455(B) that would remove a corporate hospital-admittedly a "person or enterprise"-from being liable to its vulnerable adult patients? The answer is an unqualified "no." There are five-and only five-exceptions to imposing liability on "any person or enterprise" for damages under A.R.S. § 46-455. A "person or enterprise" will not be liable if it is:
(1) a licensed physician while providing services within the scope of the licensure; [4]

(2) a licensed podiatrist while providing services within the scope of the licensure; [5]

(3) a licensed registered nurse practitioner while providing services within the scope of the licensure; [6]

(4) a licensed physician assistant while providing services within the scope of the licensure; [7] or

(5) a person who was the primary provider of medical services to the patient in the last two years before it was recommended that the patient be admitted to a nursing care institution, an assisted living center, an assisted living facility, an assisted living home, an adult day health care facility, a residential care institution, an adult care home, a skilled nursing facility or a nursing facility. [8]

Because a corporate hospital does not fit any of those five exceptions, under APSA a corporate hospital can be liable for **abusing** or neglecting one of its vulnerable adult patients. There is no need to explore any of the convoluted exceptions to the five APSA exceptions. After all, none of the five APSA exceptions applies to a corporate hospital that has been accused of committing **abuse** and neglect against its vulnerable adult patient. So exceptions to those five APSA exceptions are irrelevant.

The statutory construction is clear and simple. As the Arizona Supreme Court explained in its most recent APSA case-the 2011 *Estate of Braden v. State*, 228 Ariz., 323, 266 P.3d 349 (2011) opinion-the first step in construing APSA is to "examine APSA's language to determine it has a plain meaning and clearly reflects the legislature's intent." [9] In *Estate of Braden*, the Court concluded that the meaning of word "enterprise" in A.R.S. § 46-455 was "not entirely clear" in relation to the State, so it indulged in further statutory construction. [10]

Here, however, there is clarity. APSA's plain text is unambiguous and clear. Under that plain text, a corporate hospital is both a "person" and an "enterprise." As *Estate of Braden* held, when a statute's plain text is clear and unambiguous, there is no need to resort to any other methods of statutory construction to determine legislative intent, since that intent is easily discernible from the statute's face. [11]

In summary, under APSA, a corporate hospital is a "person" or "enterprise" when it is providing care to a vulnerable adult patient. Not one of APSA's five exceptions applies to such a corporate hospital. If that corporate hospital **abuses** or neglects one of its vulnerable adult patients, it will be liable for that **abuse** and neglect under APSA. APSA is, after all, "a statutory scheme that protects vulnerable adults by," among other things, "providing for civil enforcement against those who violate its terms." [12]

APSA is one of Arizona's strongest remedial laws. The Legislature has announced that the civil action APSA authorizes is "remedial" and "is not limited by any other civil remedy or criminal action or any other provision of law." [13] The Arizona Legislature passed APSA "to increase the remedies available to and for vulnerable or incapacitated people who have been harmed by their caregivers." [14] Because APSA is a remedial statute, the Arizona Supreme Court has directed that it "should be broadly construed to effectuate the legislature's purposes in enacting it." [15] This Court may not-indeed, cannot-limit APSA's remedial reach by construing it to immunize corporate hospitals.

B. IT IS NOT THE TYPE OF FACILITY WHERE THE ABUSE OR NEGLECT OCCURRED, BUT THE NATURE OF THE ABUSE OR NEGLECT THAT DETERMINES WHETHER AN APSA CLAIM LIES

The Adult Protective Services Act ("APSA"), A.R.S. §46-451 et seq. was enacted to protect the most vulnerable from **abuse** or neglect, as those terms are defined in A.R.S,§46-451. It was not enacted to protect hospitals from responsibility when vulnerable patients are **abused** or neglected in hospitals. Vulnerable patients can be **abused** or neglected in hospitals just as they can in nursing homes - it depends on the condition and needs of the patients, including their ability to protect themselves, and the type of care undertaken to protect them from **abuse** or neglect to which they are particularly vulnerable.

The definitions in A.R.S. §46-451 provide understanding as to the setting and circumstances in which **abuse** and neglect can give rise to the protections afforded by APSA. Those definitions are:
"**Abuse**" means:

(a) Intentional infliction of physical harm.

(b) Injury caused by negligent acts or omissions.

(c) Unreasonable confinement.

(d) Sexual **abuse** or sexual assault.

A.R.S. §46-451 (A).

“Neglect” means a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.

A.R.S. §46-451(A)(6).

“Vulnerable adult” means an individual who is eighteen years of age or older and who is unable to protect himself from **abuse**, neglect or exploitation by others because of a physical or mental impairment. Vulnerable adult includes an incapacitated person as defined in section 14-5101. §46-451(A)(9).

This case presents an easy example of how hospitals and nursing homes do not differ in the type of patient and nature of neglect leading to harm that can occur. The patient was immobile and therefore at risk of developing pressure ulcers. He was at the hospital for twenty days, rather than at a nursing home; in fact, he was in a condition such that it was recommended he go to a nursing facility. He developed severe pressure ulcers, due to prolonged neglect on the part of hospital staff who failed to provide the daily care needed to protect him from those types of injuries. The only difference in this scenario from a typical nursing home APSA case is that the neglect occurred at a hospital. To immunize the hospital for doing what would render a nursing home subject to an APSA claim, would require a finding that the Legislature specifically intended that vulnerable patients who are neglected in a hospital setting are not entitled to the same protection as nursing home residents. There is no language in the statute that would provide such an exception for hospitals.

A.R.S. § 46-455 (B) provides:

> A vulnerable adult whose life or health is being or has been endangered or injured by neglect, **abuse** or exploitation may file an action in superior court against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such vulnerable adult for having caused or permitted such conduct.

Thus, the plain language of the statute allows a vulnerable adult to bring a claim against “any person or enterprise that has been employed to provide care” (with limited exceptions for certain licensed individuals, which have no bearing on the issue here). Hospitals are not exempt. Moreover, to suggest such a differentiation makes no sense - why should patients who meet the definitions in A.R.S. §46-451 not be protected merely because they are kept in a hospital?

Defendant is concerned whether typical acute hospital care, such as fixing a fractured leg, or administering an IV, or removing a gall bladder might give rise to an APSA claim and thereby expand the scheme of traditional medical malpractice liability. But that concern is resolved when we consider that most hospital care does not involve the types of problems addressed by APSA. When the definitions of vulnerable or incapacitated are read along with the definitions of **abuse** or neglect, this reading carves out many typical hospital scenarios but still serves the purpose of APSA to protect those who are unable to protect themselves from the effects of neglect.

This was the reasoning of the Court in the *McGill v. Albrecht, 203 Ariz. 525, 57 P.3d 384 (2002)* case. The issue in *McGill* was whether a single act of negligence could give rise to an APSA claim since the language of the statute used the plural:

"acts". 203 Ariz. at 528. The Court wisely stated that it would interpret the statute to give meaning to the obvious intent of the Legislature to protect the **elderly**:

> "We do not believe interpreting APSA so as to apply to any and every single act of medical malpractice would be consistent with the legislature's obvious intent to protect a class of mostly **elderly** or mentally ill citizens from harm caused by those who have undertaken to give them the care they cannot provide for themselves."

203 Ariz. at 529 ¶. In furtherance of this goal, the Court came up with a four-part test to decide whether a case fits the APSA law:

> "We hold instead that to be actionable **abuse** under APSA, the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient's incapacity, and (4) must be related to the problem or problems that caused the incapacity."

McGill (emphasis added). It should be noted that *McGill* did NOT limit the protection of APSA to "**elderly**" patients - it was merely dealing with a patient who happened to be **elderly**. The Legislature did not limit APSA to the "**elderly**" but to "vulnerable or incapacitated. Was Plaintiff Garcia "vulnerable" in the sense that, like some **elderly** patients whose age creates limitations on their ability to protect themselves from harm? Clearly so - he was septic, had severe pneumonia, had no legs, had diabetes, was malnourished, was heavily sedated on a ventilator and feeding tube - he had all the characteristics of the type of patient in a nursing home needing hands on care to prevent pressure ulcers.

If a case does not meet parts (3) and (4) of the *McGill* test, then the types of hospital staff actions that concern Defendant would exclude the hospital from liability under APSA. Acts such as negligently giving medication, or repairing a fracture, or removing a gall bladder would not be "linked to the service the caretaker undertook because of ... incapacity" or "related to the problem ... that caused the incapacity." However, if a patient is unable to eat or move and is thereby incapacitated or "vulnerable" because of such conditions, and then the hospital staff's failure to feed or move the patient, resulting in malnutrition or pressure ulcers, then the case is brought under the purpose of APSA's definition of "neglect."

In other words, to paraphrase *McGill*, one must look at the condition of the patient and whether the patient has some incapacity requiring a "relationship of caregiver and recipient" that addresses the cause of that incapacity and that "the caregiver undertook to care for because of the incapacity" for APSA to apply. This is an entirely different approach than that suggested by Defendant to merely consider the type of facility where the caregivers' actions took place.

As the *McGill* Court wrote:
"... we are commanded not to apply the statutory rules of construction when 'such construction would be inconsistent with the manifest intent of the legislature.' A.R.S. §1-211(A)."

203 Ariz. at 529.

The manifest intent of the Legislature was to protect vulnerable and incapacitated persons - those who were in a condition where they were chronically vulnerable to the effects of neglect or **abuse** due to their incapacity. As *McGill* affirmed, "the statute was intended to *increase* the remedies available to and for **elderly** people who had been harmed by their caregivers." 203 Ariz. at 528. There is no indication the legislature intended not to carry out that goal merely because the neglect occurs in a hospital setting. Rather, carving out an exception for hospitals would significantly decrease the protections for vulnerable adults and frustrate the Legislature's intent.

A strict reading of the definition of "**abuse**" is more problematical than "neglect" because the language of A.R.S. §46-451(A)(1)(b) could be broadly interpreted to mean any kind of substandard care; whereas, the common meaning of the word "**abuse**" in a health care context is assaultive type behavior, such as a sexual assault or a slap or beating. If subsection (A)(1)(b) is read with an emphasis on "act," in the context of subsections (A)(1)(a), (c) and (d), the meaning takes on a different hue: an act of some deliberateness, such as a sexual assault or other intentional act that takes advantage of the incapacity of the patient. Applying the definition of (A)(1)(b) in a broad way, to include any negligent act, might truly bring a hospital under APSA for any simple act of negligence that does not correlate with purpose of APSA. That is why the *McGill* decision is informative. The four-part test of *McGill* is not met by a simple act of negligence such as a poorly set fracture or mistaken administration of the wrong medication.

There are, of course, a variety of types of acts of negligence that can occur in hospitals that would be inconsistent with the purpose of APSA to protect the vulnerable and incapacitated. Likewise, there are a variety of acts that would be consistent with the purpose of APSA. Thus, in order to serve the purpose of APSA, while recognizing that vulnerable and incapacitated hospital patients also deserve protection under APSA, each case should be decided on its own facts, taking into account the setting, the patient's condition and the nature of the acts that cause harm. For example, even though a patient may be unconscious and therefore, at the time, "vulnerable," if the wrong medication is injected into an IV, that does not have much to do with the fact that the patient is unconscious, because the medication could be injected if she were conscious all the same. On the other hand, if the hospital patient is unconscious (and therefore vulnerable or incapacitated) and a rogue nurse assaults her, it is easy to find that the purpose of APSA is met. To illustrate a *McGill* analysis in an admittedly strange example, suppose a hospital nurse deliberately deviates from physician orders and administers a sedative to keep the patient from misbehaving - that is a negligent act (with emphasis on the word "act") that would constitute **abuse** in the *McGill* context of APSA application because the act is related to the incapacity. But, if a hospital nurse mistakenly administers the wrong medication, wherein the act is not "related to the problem that caused the incapacity," then APSA would not apply, although it would be medical malpractice.

To draw out this proposition that it is the nature of the patient's needs and the negligent acts related to the incapacity that should determine whether APSA applies, rather than the type of facility, a nursing home defendant might argue that a particular act committed in a nursing home is not the type that should give rise to an APSA claim merely because it occurs in a nursing home. In order to be consistent, Plaintiffs would have to agree with such a proposition so that the purity of the purpose of APSA is preserved. APSA is intended to apply to certain types of patients and certain types of acts regardless of the setting. Thus, if a nurse in a nursing home inadvertently gives the wrong medication, this is a medical malpractice case, not an APSA-type of **abuse**, so long as the giving of wrong medications is not a series or pattern that might constitute neglect, such as the act resulting from a lack of adequate staff that led to the mistake in the first place. This is an example of the type of case-by-case analysis required in order to properly apply APSA.

In summary, whether in a hospital or a nursing home, the types of situations giving rise to an APSA claim depend on the nature of the patient's incapacity or "vulnerability" and the risks associated with same, as well as the care undertaken because of same; and if the actions giving rise to harm are related to the care that was undertaken for that incapacity. This is the *McGill* analysis applied to both hospitals and nursing homes that serves the legislature's purpose in enacting APSA.

C. THE OMISSION OF THE WORD "HOSPITAL" FROM THE TYPES OF FACILITIES ENUMERATED DOES NOT CLEARLY ENOUGH DEMONSTRATE INTENT TO EXCLUDE HOSPITAL PATIENTS FROM THE PROTECTIONS OF APSA

Defendant relies upon A.R.S. § 46-455(B)(1) to argue that since the word "hospital" was not included the list of types of facilities in which a Medical Director or primary physician was working, the Legislature must have intended to exclude hospitals from APSA. Appellee's point is misguided because that subsection merely refers to the fact that a Medical Director or primary attending physician in those facilities can be sued, whereas physicians practicing elsewhere are exempt.

The simple answer as to why “hospital” is not listed is that this provision refers to Medical Directors and attending physicians who work closely in nursing care institution settings and have responsibility to direct care in such facilities. Arizona hospitals don't typically use “Medical Directors,” although they may have chiefs of staff or administrators. But those positions are not engaged with the day-to-day supervision of nursing care unlike physicians whose work involves credentialing and planning at a high level in a hospital. And attending physicians in nursing homes typically are assigned a number of residents and are in the front lines of delivering care for such residents. This is not the case in hospitals where consulting physicians and specialists in radiology and surgery come in, do their thing, and are not engaged in ongoing supervision of nursing staff; hence, the omission of the word “hospitals” in that subsection.

If the Legislature had intended to grant a wholesale exclusion of hospitals from the effects of APSA, it would have made it clearer than to simply omit the word “hospitals” from a subsection that deals with the exception of the types of physicians who are subject to APSA.

CONCLUSION

Plaintiffs believe that the provisions of APSA apply to hospital care that constitutes neglect or **abuse** as interpreted by *McGill* and that the Court's ruling refusing an APSA instruction should be reversed. At least, the Court should make a finding that Plaintiff meets the predicate definition of a vulnerable adult and that he was neglected, based on the evidence supported by the jury's verdict.

Dated this 2nd day of July, 2013.

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ORIGINAL of foregoing e-filed with the Court this 2nd day of July, 2013.

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Footnotes

1 See A.R.S. § 1-211(A) (The rules and the definitions set forth in this chapter shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature.")

2 See Black's Law Dictionary 611 (9th ed. 2009) (An "enterpnse" is an "organization or venture, esp. for business purposes."): Mernam-Webster's Collegiate Dictionary 416 (11th ed. 2004) (An "enterpnse" is "a unit of economic organization or activity, esp.: a business organization.")

3 A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language.")

4 A.R.S. § 46-455(B)

5 Id.

6 Id.

7 Id.

8 See A.R.S. § 46-455(B)(1) and A.R.S. § 46-455(C)

9 *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323. 325 ¶ 10. 266 P.3d 349. 351 ¶ 10 (2011)

10 Id.

11 Id. at 325 ¶ 8, 266 P.3d at 351 ¶ 8

12 *Id.* at 325 ¶ 6, 266 P.3d at 351 ¶ 6

13 A.R.S. § 46-455(0)

14 Estate of *McGill ex* rel. *McGill v. Albrecht*, 203 Ariz. 525. 528 ¶ 6. 57 P.3d 384, 387 ¶ 6 (2002)

15 In re *Estate of Winn*, 225 Anz. 275, 237 P.3d 628 (App. 2010). review denied (Jan. 4, 2011)

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